

Thompson v Lamprecht Transp.
2004 NY Slip Op 30360(U)
September 30, 2004
Supreme Court, Queens County
Docket Number: 15915/2003
Judge: James P. Dollard
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NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JAMES P. DOLLARD
Justice

IA Part 13

MARIE THOMPSON, et al.

x

Index
Number 15915 2003

- against -

Motion
Date June 23, 2004

LAMPRECHT TRANSPORT, et al.

Motion
Cal. Number 42

X

The following papers numbered 1 to 13 read on this motion by defendants to dismiss the complaint asserted against them on the grounds of collateral estoppel and res judicata and failure to state a cause of action, and by defendant Lamprecht Transport AG (s/h/a Lamprecht Transport) (Lamprecht Transport) to dismiss the complaint against it based upon lack of personal jurisdiction; and this cross motion by plaintiffs to dismiss the affirmative defenses asserted by defendants, and leave to replead.

Papers
Numbered

Notice of Motion - Affidavits - Exhibits 1-6
 Notice of Cross Motion - Affidavits - Exhibits ... 7-10
 Answering Affidavits - Exhibits 11-13

Upon the foregoing papers it is ordered that the motion and cross motion are determined as follows:

Plaintiffs commenced this action alleging that plaintiff Marie Thompson was the victim of unlawful employment discrimination, based upon sex, committed by defendants Lamprecht Transport and American Lamprecht Transport, Inc., her alleged former employers and defendants Thomas Lamprecht, the alleged owner and chief executive officer of the corporate defendants, Hans-Peter Widmer, the president of defendant

American Lamprecht Transport, Inc., Alan¹ Tiercy and Walter Willin, vice-presidents of defendant American Lamprecht Transport, Inc., and Patrice Casimir, a coworker and branch manager of the Miami office of defendant American Lamprecht Transport, Inc. Plaintiffs allege that throughout the course of Marie Thompson's employment by defendants Lamprecht Transport and American Lamprecht Transport, Inc., as a licensed customs broker, she was subjected to sexual harassment by defendant Casimir in the form of derogatory and demeaning comments, and his physical assault of her on July 6, 2000, when he purportedly struck her in her left breast. According to plaintiffs, notwithstanding Marie Thompson's complaints to her superiors regarding the sexual harassment allegedly committed by defendant Casimir, defendants acquiesced in, or condoned, such unlawful discriminatory conduct by failing to take corrective action. Plaintiffs allege that the terms and conditions of Marie Thompson's employment were negatively affected due to a hostile work environment created by defendants, and ultimately led to her resignation in February 2003.

Plaintiffs further allege that during Marie Thompson's employment, defendants discriminated against her and other female employees, in making promotional opportunities and training programs available only to male employees, and when hiring only male employees for executive positions. Plaintiffs also alleges that defendants retaliated against Marie Thompson for her opposition to discriminatory employment practices. Plaintiffs also allege that the individual defendants aided and abetted defendants Lamprecht Transport and American Lamprecht Transport, Inc. in violating Marie Thompson's rights under the Human Rights Law (Executive Law § 290 et seq.). Plaintiffs seek to recover compensatory and punitive damages for alleged unlawful employment discrimination, sexual harassment, discriminatory retaliation and constructive discharge pursuant to the Human Rights Law. Plaintiff James Thompson, the husband of plaintiff Marie Thompson, asserts a derivative claim for loss of consortium and emotional distress.

Defendants served an answer denying the material allegations of the complaint, and asserting nine affirmative defenses, including defenses based upon lack of personal jurisdiction over defendants Lamprecht Transport and Casimir.

To the extent defendants Lamprecht Transport and Casimir asserted lack of personal jurisdiction based upon improper service,

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Plaintiffs refer to defendant Tiercy in the caption on the summons as "Alan" Tiercy, but refer to him as "Alain" Tiercy in the caption on the complaint.

they failed to move to dismiss the complaint upon that ground within 60 days of service of a copy of the answer, and as a consequence, such defense is deemed waived with respect to them pursuant to CPLR 3211(e) (see DeSena v HIP Hosp., Inc., 258 AD2d 555; Wade v Byung Yang Kim, 250 AD2d 323; Fleet Bank, N.A. v Riese, 247 AD2d 276).

To the extent, however, defendant Lamprecht Transport asserts that the court does not have any jurisdictional bases upon which to invoke jurisdiction over it, the defense is not deemed waived (CPLR 3211[e]).

Defendant Lamprecht Transport, a Swiss corporation, has defendant American Lamprecht Transport, Inc. as its wholly-owned subsidiary. Defendant American Lamprecht Transport, Inc. is a New York corporation, which principal place of business is in New York. Plaintiff argues that this court has jurisdiction over defendant Lamprecht Transport asserting that defendants Lamprecht Transport and American Lamprecht Transport, Inc. are in fact a single entity or enterprise which is liable for employment-related acts here, and that defendant Lamprecht Transport conducted business within New York subjecting it to general jurisdiction under CPLR 301, and transacted business in New York through defendant American Lamprecht Transport, Inc., and committed tortious acts against plaintiff Marie Thompson in New York, establishing a basis for long-arm jurisdiction under CPLR 302(a).

Defendant Lamprecht Transport offers the affidavit of defendant Hans-Peter Widmer, the president of defendant American Lamprecht Transport, Inc., in which he states that plaintiff was employed by defendant American Lamprecht Transport, Inc. Defendant Widmer denies that plaintiff was an employee of any of the other named defendants, and states that Lamprecht Transport does not conduct business within the State.

Plaintiffs assert that plaintiff Marie Thompson was an employee of both defendants Lamprecht Transport and American Lamprecht Transport, Inc., that the operations of defendant Lamprecht Transport and American Lamprecht Transport, Inc. are interrelated, and that all major decisions, including the handling of Marie Thompson's complaint of sexual harassment, were made by defendant Thomas Lamprecht, as the head of defendant Lamprecht Transport. Plaintiffs' counsel further asserts that the majority of the managers of American Lamprecht Transport, Inc. are Swiss citizens under contract with defendant Lamprecht Transport, and that the revenue generated by defendant American Lamprecht Transport, Inc. is forwarded to defendant Lamprecht Transport,

which in turn, distributes funds to defendant American Lamprecht Transport, Inc. to cover operating expenses.

A foreign corporation is amenable to suit in New York pursuant to CPLR 301 if it is doing business here at the time of commencement of the action (see Massaro v Wellen Oil & Chemical, Inc., 304 AD2d 538 [2003]). Defendant Lamprecht Transport made a prima facie showing based upon the affidavit of defendant Widmer that it did not transact business in New York. Plaintiffs' offerings are not sufficient to establish that defendant Lamprecht Transport maintained a permanent and continuous presence in New York as would warrant the assertion of jurisdiction over it pursuant to CPLR 301, or to raise a question of fact to require a hearing to resolve the matter (see Landoil Resources v Alexander & Alexander Services, Inc., 77 NY2d 28 [1990]; Krakower v Battles Universal, Inc., 152 AD2d 656 [1989]; Donetto v S.A.R.L. De Gestion Pierre Cardin, 3 Misc 3d 1106 [2004]).

Generally, a non-domiciliary is subject to the jurisdiction of a New York court if it has engaged in some purposeful activity within the state and there is a "substantial relationship" between this activity and the plaintiff's cause of action (see McGowan v Smith, 52 NY2d 268 [1981]). The burden of proof rests with the party asserting jurisdiction (see Roldan v Dexter Folder Co., 178 AD2d 589 [1991]).

To the extent plaintiffs contend defendants Lamprecht Transport and American Lamprecht Transport, Inc. were actually operated as an integrated entity, they have failed to present admissible proof establishing the factors of common ownership, the financial dependency of defendant American Lamprecht Transport, Inc. on defendant Lamprecht Transport, that defendant Lamprecht Transport interfered in the selection and assignment of defendant American Lamprecht Transport's executive personnel and failed to observe corporate formalities, and that defendant Lamprecht Transport exercised any degree of control over the marketing and operational policies of defendant American Lamprecht Transport, Inc. (see generally Volkswagenwerk Aktiengesellschaft v Beech Aircraft Corp., 751 F2d 117 [1984]). Again, plaintiffs' submissions do not raise a triable issue of fact as to the issue of whether defendant Lamprecht Transport purposefully transacted business in New York through defendant American Lamprecht Transport, Inc., to establish long-arm jurisdiction under CPLR 302(a) (cf. Donetto v S.A.R.L. De Gestion Pierre Cardin, supra). Nor have plaintiffs presented sufficient evidence to demonstrate that facts essential to justify opposition to the motion to dismiss may exist, but cannot be stated without further discovery (see CPLR 3211[d]; Peterson v Spartan Indus., 33 NY2d 463

[1974]; Mandel v Busch Entertainment Corp., 215 AD2d 455 [1995]]).

Furthermore, plaintiffs have offered no evidence to show that Marie Thompson was an employee of defendant Lamprecht Transport. Rather, they seek to estop defendant Lamprecht Transport from asserting it was not an employer of Marie Thompson, based upon certain testimony of defendant Tiercy given in an administrative tribunal.²

At the May 1, 2003 unemployment insurance benefits hearing, the Unemployment Insurance Administrative Law Judge (ALJ) questioned defendant Tiercy as follows:

“Q: Thank you. Tell me your name and title for my tape recorder please.

A: My name is Alan Tiercy and I’m executive vice president of American Lamprecht.

Q: Did Ms. Thompson work for Lamprecht Transport?

A: Yes, she did.”

Plaintiff Marie Thompson had filed for unemployment insurance benefits based upon her employment with American Lamprecht Transport, Inc. The ALJ was aware of such fact, as well as Marie Thompson’s prior testimony that she had been employed by “American Lamprecht Transport.” Thus, the ALJ’s use of the phrase “Lamprecht Transport,” when questioning defendant Tiercy, clearly was a shorthand reference by the ALJ to the longer name “American Lamprecht Transport, Inc.,” and defendant Tiercy obviously understood such was the case when affirmatively answering the ALJ’s question.

Under such circumstances, that branch of the motion by defendant Lamprecht Transport to dismiss the complaint against it based upon lack of personal jurisdiction is granted.

Defendants American Lamprecht Transport, Inc., Lamprecht, Widmer, Tiercy, Willin and Casimir seek to dismiss the complaint asserted against them pursuant to CPLR 3211 (a)(5) based upon the doctrines of collateral estoppel and res judicata. They contend that plaintiffs should be precluded from claiming Marie Thompson quit her position involuntarily due to unlawful employment discrimination based upon “hostile work environment.” They assert

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See infra at pp 6-8.

that in connection with Marie Thompson's application for unemployment compensation benefits, the New York State Department of Labor found she voluntarily resigned her job with defendant American Lamprecht Transport, Inc.

Defendants American Lamprecht Transport, Inc., Lamprecht, Widmer, Tiercy, Willin and Casimir raised as an eighth affirmative defense in their answer that plaintiff Marie Thompson was hired by defendant American Lamprecht Transport, Inc. and that during the period from July 6, 2000 through February 21, 2003, she never made any claim of sexual harassment. They alleged that plaintiff Marie Thompson voluntarily resigned her position on February 24, 2003. Defendants asserted, therefore, that plaintiff Marie Thompson should be "estopped" from claiming sexual harassment. The word "estopped," as used by defendants in the eighth affirmative defense, however, connotes a somewhat different meaning than the phrase "collateral estoppel," particularly since they made no specific mention of the unemployment insurance proceedings therein. Defendants, thereafter, served a bill of particulars dated January 9, 2004, where, for the first time, they referred to the findings of the ALJ and specifically related them to their eighth affirmative defense.

Plaintiffs, nevertheless, make no argument that defendants originally failed to raise the defenses of collateral estoppel or res judicata in the answer, and should be deemed to have waived such defenses (see CPLR 3211[e]; cf. Mayers v. D'Agostino, 58 NY2d 696 [1982]). Rather, plaintiffs have addressed the merits of such defenses. Because parties are free to chart their own procedural course, the court shall deem the answer to have included such defenses from the outset, and consider their viability with respect to defendants American Lamprecht Transport, Inc., Lamprecht, Widmer, Tiercy, Willin and Casimir.

Plaintiff Marie Thompson filed for unemployment insurance benefits following her tender of a letter of resignation dated February 24, 2003 to defendant American Lamprecht Transport, Inc. The claim was denied by a claims examiner at a local office with the New York State Department of Labor on the ground Marie Thompson quit her job without good cause notwithstanding her statement that she resigned due to a "HOSTILE ENVIRONMENT." The claims examiner found that plaintiff Marie Thompson failed to provide specific detailed information regarding the final incident of a "'CONTINUED HOSTILE ENVIRONMENT'" which caused her to quit her job.

The claims examiner subsequently issued another notice of determination dated April 8, 2003, in which he again found that plaintiff Marie Thompson quit her job without good cause. In that

notice, the claims examiner determined plaintiff Marie Thompson had stated she was caused to quit her job because she believed her employer's new branch manager was unqualified to give instructions to the office, and she feared her customs broker's license could be placed in jeopardy thereby. The claims examiner further determined the employer had responded that plaintiff Marie Thompson would have had an opportunity to discuss any of her concerns regarding her license with the new branch manager. Plaintiff Marie Thompson requested a hearing for the purpose of reconsidering the local office's decision denying her benefits, and one was scheduled to be held before an ALJ on April 17, 2003.

At the hearing, plaintiff Marie Thompson appeared with her counsel, but defendant American Lamprecht Transport, Inc. did not, having submitted a written request for an adjournment based upon the unavailability of its counsel due to its counsel's participation in religious observances. The ALJ denied the request for an adjournment, and began the hearing, which was tape-recorded. Plaintiff Marie Thompson testified at the hearing, regarding the impact of personnel changes in the management of her office, and her concerns that if she had remained at the job, incompetent supervision would have jeopardized the maintenance of her customs broker's license.

When plaintiff Marie Thompson shifted the focus of her testimony to an incident of purported physical, verbal and sexual abuse by defendant Casimir, the ALJ interrupted her stating "[t]his is starting to get like Peyton Place real fast." At this point, the ALJ reversed himself, and granted defendant American Lamprecht Transport, Inc.'s written request for an adjournment. The ALJ remarked that "[w]e are going to start all over again with the employer here" and "I'm going to half [sic] to play nearly half an hour of tape and then we will go over the whole thing again." The ALJ scheduled the next hearing for May 1, 2003, after first obtaining the consent of plaintiff Marie Thompson and defendant Tiercy³ as to the date.

Plaintiff Marie Thompson defaulted in appearing before the ALJ on the rescheduled hearing date, and defendant American Lamprecht Transport, Inc. appeared by its counsel. Defendant Tiercy testified at the hearing on behalf of defendant American Lamprecht Transport, Inc. that while plaintiff Marie Thompson was on vacation for her position at the New York branch office of American Lamprecht Transport, Inc., she had sent him an e-mail on

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The ALJ contacted defendant Tiercy by telephone and the call was placed on the speaker phone.

February 24, 2003, advising him she was quitting her job. He also testified that to the extent plaintiff Marie Thompson had complained of any announced change in supervisory personnel at the New York branch office, the person designated to become the new branch manager did not commence work there until after she quit.

Following the hearing, the ALJ issued a determination sustaining the claim examiner's decision that plaintiff Marie Thompson voluntarily left her employment without good cause. The ALJ stated he accepted the testimony of defendant Tiercy and found that the credible evidence showed plaintiff Marie Thompson had suddenly quit working, at a time when continuing work was available to her, and she did so for "reasons best known to herself." It does not appear from the papers submitted herein that the ALJ's decision was appealed to the Unemployment Insurance Appeal Board of the New York State Department of Labor, or that plaintiff Marie Thompson ever commenced an Article 78 proceeding to challenge the denial of unemployment insurance benefits.

"Collateral estoppel, or issue preclusion, gives conclusive effect to an administrative agency's quasi-judicial determination when two basic conditions are met: (1) the issue sought to be precluded is identical to a material issue necessarily decided by the administrative agency in a prior proceeding; and (2) there was a full and fair opportunity to contest this issue in the administrative tribunal (see Ryan v New York Tel. Co., 62 NY2d 494 [1984]; see also Schwartz v Public Adm'r of County of Bronx, 24 NY2d 65 [1969]). The proponent of collateral estoppel must show identity of the issue, while the opponent must demonstrate the absence of a full and fair opportunity to litigate" (Jeffreys v Griffin, 1 NY3d 34 [2003]).

Contrary to the argument of defendants American Lamprecht Transport, Inc., Lamprecht, Widmer, Tiercy, Willin and Casimir, the doctrines of collateral estoppel and res judicata do not bar plaintiff Marie Thompson's cause of action to recover damages based upon unlawful employment discrimination (see Shaffer v Victory Van Lines, Inc., 265 AD2d 543 [1999]; Board of Educ. of Manhasset Union Free School Dist. v New York State Human Rights Appeal Bd., 106 AD2d 364 [1984]). Furthermore, to the extent plaintiffs allege Marie Thompson was a victim of disparate treatment in employment based upon gender, such allegation was not raised or addressed during the unemployment insurance proceedings. To the extent plaintiff Marie Thompson alleges sexual harassment by defendant Casimir and hostile work environment, she was not afforded a full and fair opportunity to litigate these allegations before the ALJ insofar as the ALJ cut off her testimony and did not allow her to complete it on the first hearing date. Although plaintiff

Marie Thompson defaulted at the second hearing, the transcript does not indicate the ALJ explored the issue of whether Marie Thompson had been subjected to sexual harassment by defendant Casimir with defendant Tiercy. Rather, it appears the ALJ merely asked defendant Tiercy whether there had been "some kind of problem with some new supervisor...."

Under such circumstances, the branch of the motion by defendants American Lamprecht Transport, Inc., Lamprecht, Widmer, Tiercy, Willin and Casimir to dismiss the complaint against them based upon the doctrines of collateral estoppel and res judicata is denied.

Defendants American Lamprecht Transport, Inc., Lamprecht, Widmer, Tiercy, Willin and Casimir seek to dismiss the complaint asserted against them on the ground that plaintiffs failed to state a cause of action against them.

With respect to the law applicable to a motion pursuant to CPLR 3211(a)(7) to dismiss a complaint, pleadings shall be liberally construed, the facts as alleged accepted as true, and every possible favorable inference given to plaintiffs (see Leon v Martinez, 84 NY2d 83, 87 [1994]; Dye v Catholic Medical Center of Brooklyn and Queens, Inc., 273 AD2d 193 [2000]). On such a motion, the court is limited to examining the pleading to determine whether it states a cause of action (see Guggenheimer v Ginzburg, 43 NY2d 268, 275 [1977]).

New York tracks the same standards as the federal courts in cases alleging sex discrimination in employment (see Matter of Aurecchione v State Div. of Human Rights, 98 NY2d 21, 25-260 [2002]; Kent v Papert Companies, Inc., 309 AD2d 234 [2003]). Plaintiff Marie Thompson alleges that defendants believed in gender stereotypes which adversely affected their decisions regarding her terms and conditions of employment. She also alleges that her requests to be informed of promotional opportunities or the creation of new positions were ignored, that defendants made promotional and hiring decisions based upon gender rather than merit, and that only men were hired to fill promotional and new positions during the period January 1995 through February 2003. Plaintiff Marie Thompson alleges that she was denied the opportunity to advance to a managerial position based upon her gender, and because she had opposed discriminatory practices engaged in by defendants. Such allegations are sufficient to state a cause of action by defendant Marie Thompson against defendants American Lamprecht Transport, Inc. for sex discrimination based

upon disparate treatment under the Human Rights Law⁴ (see generally McDonnell Douglas Corp. v Green, 411 US 792, 802 [1973]; see also Swierkiewicz v Sorema, 534 US 506 [2002]; cf., Alimo v Off-Track Betting Corp., 258 AD2d 306 [1999]).

To the extent plaintiff Marie Thompson alleges that defendant Casimir subjected her to sexual harassment, "if a plaintiff's supervisor is the alleged harasser, an employer will be liable if the supervisor uses his actual or apparent authority to further the harassment, or if [the supervisor] was otherwise aided in accomplishing the harassment by the existence of the agency relationship...." By contrast, where a low-level supervisor does not rely on his supervisory authority to carry out the harassment, or a co-employee of the plaintiff is the alleged harasser, an employer will generally not be liable unless the employer either provided no reasonable avenue of complaint or knew of the harassment but did nothing about it [Tomka v Seiler Corp., 66 F3d 1295, 1304 [2d Cir 1995], citing Karibian v Columbia University, 14 F3d 773, 780 [2d Cir 1994], cert denied 512 US 1213 [1994] and Kotcher v Rosa and Sullivan Appliance Center, Inc., 957 F2d 59, 63 [2d Cir 1992] (internal quotations and citations omitted) (alteration in the original)] (Yaba v Roosevelt, 961 F Supp 611 [SD NY 1997]).

In this instance, plaintiff Marie Thompson avers that defendant American Lamprecht Transport, Inc. knew of the sexual harassment by defendant Casimir, but failed to take steps to stop it and instead, promoted defendant Casimir by appointing him manager of the newly-created Florida branch office. In addition, she avers defendant American Lamprecht Transport, Inc. retaliated against her for her voicing her complaints of sexual harassment, by refusing to consider her for promotional opportunities, and by requiring her to have telephone contact with defendant Casimir on a daily basis.

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To survive a motion for summary judgment, plaintiff Marie Thompson will need to show that she was qualified for the job or was meeting her defendant American Lamprecht Transport, Inc.'s legitimate expectations; she suffered an adverse employment action; and defendant American Lamprecht Transport, Inc. treated similarly-situated male employees more favorably than female employees (see Classic Coach v Mercado, 280 AD2d 164 [2001], lv to appeal denied, 97 NY2d 601 [2001]; see also Kent v Papert Companies, Inc., supra; see generally McDonnell Douglas Corp. v Green, 411 US 792, 802 [1973]).

Defendant Widmer states in his affidavit that he, and defendants Lamprecht and Tiercy met with defendant Casimir on July 24, 2000, and concluded that defendant Casimir had not engaged in any inappropriate conduct, that the "incident" on July 6, 2000 had been nothing more than a "heated argument" between two employees. In addition, he stated that defendant Casimir was thereafter transferred on August 1, 2000, to a new office of defendant American Lamprecht Transport, Inc. Such affidavit, without more, raises questions of fact as to whether defendant American Lamprecht Transport, Inc. properly investigated plaintiff Marie Thompson's complaint of sexual harassment, and whether defendant American Lamprecht Transport, Inc. had a legitimate, independent, and nondiscriminatory reason to support its employment decision not to take any remedial steps.

Under such circumstances, plaintiff Marie Thompson has stated a claim against defendant American Lamprecht Transport, Inc. for creation of a hostile work environment based upon sexual harassment (see Veriarellis v Pall Corp., 302 AD2d 377 [2003]; San Juan v Leach, 278 AD2d 299 [2000]; Yaba v Roosevelt, *supra*), constructive discharge (see Vorel v NBA Properties, Inc., 285 AD2d 641 [2001]; see also Flaherty v Metromail Corp., 235 F3d 133 [2d Cir 2000]; Young v Southwestern Savings and Loan Assn., 509 F2d 140, 144 [5th Cir (1975)]), and for discriminatory retaliation (see Executive Law § 296[7]; cf. Todzia v Saint Vincent Catholic Medical Centers, 6 AD3d 523 [2004]).

A coemployee may be individually subject to an employment discrimination suit under the Human Rights Law only if he or she has an ownership interest in the corporate employer, or has the authority "to do more than carry out personnel decisions made by others" (Patrowich v Chemical Bank, 63 NY2d 541, 542 [1984]; see also, Priore v New York Yankees, 307 AD2d 67 [2003], *lv to appeal denied* 1 NY3d 504 [2003]; Brotherson v Modern Yachts, 272 AD2d 493 [2000]; Murphy v ERA United Realty, 251 AD2d 469 [1998]; Trovato v Air Express Intl., 238 AD2d 333 [1997]; Monsanto v Electronic Data Sys. Corp., 141 AD2d 514, 515 [1998]). In this instance, plaintiffs allege that defendant Lamprecht had an ownership interest in defendant American Lamprecht Transport, Inc., and that defendants Willin, Widmer, Tiercy, Casimir and Lamprecht had the requisite authority to be subjected to personal liability. Defendants have failed to provide evidence otherwise, and thus, plaintiff Marie Thompson has stated a cause of action against the individual defendants for a violation of her rights under the Human Rights Law.

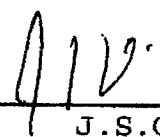
To the extent plaintiff Marie Thompson seeks to recover damages for intentional infliction of emotional distress, the

complaint is insufficient to state a cause of action against defendant American Lamprecht Transport, Inc. (see Veriarellis v Pall Corp., supra; Stallings v U.S. Elecs., 270 AD2d 188 [2000]) and against defendants Willin, Widmer, Tiercy and Lamprecht (see generally Howell v New York Post Co., 81 NY2d 115, 121; cf. Veriarellis v Pall Corp., supra; Stallings v U.S. Elecs., supra; Murphy v ERA United Realty, supra). The complaint, however, is sufficient to state a claim for intentional infliction of emotional distress as against defendant Casimir (see Veriarellis v Pall Corp., supra; Stallings v U.S. Elecs., supra; Murphy v ERA United Realty, supra).

That branch of the motion by defendants seeking to dismiss the complaint for failure to state a cause of action against them is granted only to the extent of dismissing the cause of action for intentional infliction of emotional distress against defendants American Lamprecht Transport, Inc., Willin, Widmer, Tiercy and Lamprecht.

To the extent plaintiffs seek to dismiss the affirmative defenses raised in the answer of defendants American Lamprecht Transport, Inc., Willin, Widmer, Tiercy and Lamprecht, they have only addressed those defenses based upon lack of personal jurisdiction and collateral estoppel and res judicata. Because plaintiffs have offered no evidence or legal argument in support of dismissal of the remaining defenses, the court declines to consider the merits of such defenses. Thus, the cross motion by plaintiffs is granted only to the extent of dismissing affirmative defenses asserted by defendants Lamprecht Transport and Casimir based upon improper service, and the affirmative defenses raised by defendants American Lamprecht Transport, Inc., Willin, Widmer, Tiercy and Lamprecht based upon collateral estoppel and res judicata.

Dated: September 30, 2004



J.S.C.